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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/694,521	10/23/2000	George Frey	4002-2512	9645
7590	04/20/2004			EXAMINER
Douglas A. Collier Woodard, Emhardt, Naughton, Moriarty and McNett Bank One Center/Tower 111 Monument Circle, Suite 3700 Indianapolis, IN 46204-5137			PRIDDY, MICHAEL B	
			ART UNIT	PAPER NUMBER
			3732	17
DATE MAILED: 04/20/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Offic Action Summary</b>	Application No.	Applicant(s)
	09/694,521	FREY ET AL.
	Examiner	Art Unit
	Michael B Priddy	3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on \_\_\_\_\_.
- 2a) This action is **FINAL**.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 39-45 and 50-118 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) 39-45 and 73-118 is/are allowed.
- 6) Claim(s) 50,51,53-57,62-64,66,67 and 69 is/are rejected.
- 7) Claim(s) 52, 58-61, 65, 68 and 70-72 is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____.
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>16</u> .	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____.

**DETAILED ACTION**

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 50, 51, 53-57, 62-64, 66, 67 and 69 are rejected under 35 U.S.C. 102(e) as being anticipated by Stone et al. (U.S. 6,387,130). Stone et al. teaches a segmented linked intervertebral implant system and a method for installing said system. Fig. 9 illustrates a method of inserting the segmented implant system 10 in which an elongated member 30 is operated through a cannula 60 which has been inserted through a posterior lateral opening into the disc space. Implant segments 20A-20D are engaged by elongated member 30 via through-holes 21 and may be pushed together by contacting the each trailing end with positioning tool 70 until the segments 20A-20D

abut one another in a curved shaped intervertebral assembly 10. As segments 20A-20D are pushed into the intervertebral space, they are pivoted along the curved path of elongated member 30 by the pushing of positioning tool 70 and the pulling of hook 66.

As shown in Fig. 1, the implanted assembly 10 includes a convexly curved wall and an opposite concavely curved wall and the convexly curved wall is anteriorly oriented. When only three segments are used, the center segment 20B is positioned such that its leading end is on a side of the spinal column axis opposite the opening and its trailing end is positioned on a side of the spinal column axis adjacent the opening. Segment 20C is positioned in a proximal portion of the disc space adjacent the opening and segment 20A is positioned distally from the opening thereby bi-laterally supporting the vertebrae.

The step of actually creating an opening is considered inherent since a posterior lateral opening must exist in order to insert a cannula 60 as shown in Figs. 3, 9 and 10.

#### ***Response to Arguments***

With respect to claims 50, 51, 53-57, 62-64, 66, 67 and 69, Applicant has argued that Stone et al. does not teach “pivoting the implant in the disc space through a force applied to the trailing end of the implant”; or “applying pushing and pivoting forces to the implant to position the implant through the opening and in the disc space along a non-linear insertion path.” As Applicant has noted, the implants of Stone et al. “have ends which are angled such that when the implants are pulled or pushed together, the will tend to form a generally C-shaped assembly.” It is the Examiner’s view that pushing or

pulling together segments 20A-20D of the implant of Stone et al. would inherently cause them to pivot since two segments meeting at corners on the larger radius of curvature will pivot about those corners such that their flat sides meet. Also, Fig. 9 clearly shows segment 20A pivoted from its initial insertion position (approximate position of 20D). By this reasoning, the rejection of the above-referenced claims is believed proper and therefore maintained.

***Allowable Subject Matter***

Claims 39-45 and 73-118 are allowed.

Claims 52, 58-61, 65, 68 and 70-72 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael B. Priddy whose telephone number is (703) 308-8620. The examiner can normally be reached on Mon.-Fri. 8 a.m. - 5 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.

Michael B. Priddy

*Michael B. Priddy*  
October 28, 2003

*Kevin Shaver*  
KEVIN SHAVER  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3700